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No. 98-939

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

DAVID KEENE LEAVITT, ANNE GILMORE CONATY
ELEANOR WOLFE CONATY, THOMAS CONATY,
and
BRIAN P. CONATY,

Petitioners,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Appeals Of West Virginia

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

RESPONSE TO FACTUAL ASSERTIONS 1
RESPONSE TO LEGAL ARGUMENTS 7
CONCLUSION 10

TABLE OF AUTHORITIES

CASES

BMW of North America, Inc. v. Gore,
517 U.S. 559, 116 S.Ct. 1589,
134 L.Ed.2d 809 (1996) 10
Hudgins v. Kemp,
59 U.S.530 (1856) 9
Kessel v. Leavitt et al.,
1998 W.Va. LEXIS 1355, (*cert. denied
and opinion decertified)*, 1998 Cal. LEXIS 4
Lehr v. Robertson,
463 U.S. 248, 103 S.Ct. 2985,
77 L.Ed.2d 614 (1983) 2,7,8
*National Union of Marine Cooks &
Stewards v. Arnold*,
348 U.S.37 (1954) 8
Patterson v. Warner,
371 F.Supp. 1362 (S.D.W.Va., 1972),
noted probable jurisdiction 415 U.S. 303 (1974) 8,9

STATUTES

W.Va.Code, 53-5-9 4

MISCELLANEOUS

5 Am.Jur.2d Appellate Review §442 (1995) 9
C.Wright & A. Milier, Federal Practice & Procedure
§2905 (1995) 9

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RESPONSE TO FACTUAL ASSERTIONS

In his brief, Respondent John Woodruff Kessel questions why the Petitioners made note of the fact that he had suggested to Anne Conaty on several occasions that she should have an abortion and the fact that he had failed to offer any financial support to her during the pregnancy. (Opp. 2). These facts, which are not disputed by the Respondent, are relevant to the constitutional issue of whether the Respondent, as the biological father, had grasped his opportunity to be parent, as

defined by several of this Court's decisions recognizing the Due Process and Equal Protection rights of some biological fathers. *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983). In light of the critical relevance of these facts to this constitutional analysis, it is not surprising that the Respondent would want to distance himself from his own acts, which are more indicative of a person trying to avoid parental responsibilities rather than actively pursuing them.

The Respondent seems to believe that the filing of multiple unsuccessful lawsuits against the Petitioners demonstrates his fitness to be a parent. Thus, the Respondent equates his desire to hit the litigation lottery and bankrupt the Petitioners with the very wrenching and loving decision made by Anne to place her child for adoption. Unfortunately for the Respondent, this Court's precedents support Anne's decision and preclude him from interfering with the choice she made in the best interests of her child.

The Respondent next quotes *dicta* from a decision issued by the California Court of Appeal, which considered Petitioner David Leavitt's challenge to the Respondent's efforts in California to execute the West Virginia judgment, when the West Virginia appeal was still pending. (Opp. 4). Several facts regarding this intermediate California court decision demonstrate that it should not be given any weight in the present case.

First, the issue presented to the California Court of Appeal was whether the Respondent could execute on his judgment against Leavitt prior to the final resolution of the appeal by the West Virginia Supreme Court with respect to the Conatys. Significantly, the California Court of Appeal did not have before it the entire trial transcript nor was it presented with factual findings by the California trial court making the derogatory and false findings noted in the Respondent's brief. (Opp. 4). In fact, the California trial court had agreed with

Leavitt that West Virginia lacked personal jurisdiction over him. Thus, the fact that the California Court of Appeal made several broad derogatory findings without any factual support in the record should eliminate any reliance this Court might have on such *dicta*.

Second, the derogatory assertions made by the California Court of Appeal are provably wrong and unsupported by any facts or inferences. Generally, the California Court of Appeal asserts that Leavitt lied in his deposition, allowed the adoptive parents to file a false affidavit, and ignored a West Virginia temporary injunction enjoining the adoption. (Opp. 4). Each of these assertions will be addressed separately.

Leavitt was forced to waive the attorney-client privilege and to give a deposition in West Virginia, despite a previous ruling by a California trial court that he was required to assert the privilege when he was first deposed in California, which ruling was never reversed. There has never been any finding by any court in West Virginia or California that Leavitt lied during his West Virginia deposition. In the West Virginia Supreme Court's extensive decision, there is no finding or inference that Leavitt had lied either in his deposition or at trial. Leavitt is a very experienced nationally recognized adoption lawyer who answered all questions in his deposition and at trial truthfully and any assertion otherwise simply is without any foundation.

As for the affidavit filed by the adoptive couple in connection with the Canadian adoption, Leavitt did not have anything to do with the drafting of any such affidavit nor was he counsel for this couple. He received the affidavit by the adoptive couple after it had been prepared by Canadian counsel and filed in court. If something in their affidavit turned out to be false, then that was the responsibility of the couple or their counsel, not Leavitt. However, a review of that affidavit reveals that all of the assertions were in fact true.

The reference to the *ex parte* temporary injunction order demonstrates the failure of the California Court of Appeal to understand the West Virginia proceedings and West Virginia law. The temporary injunction order, which sought to enjoin Anne from placing her baby for adoption, did not have any impact on Anne, Leavitt, or any of Petitioners for several reasons. First, she did not have actual or even constructive notice of the order until after she had placed her baby for adoption. The placement occurred on July 25, 1991, while the service of this order on Anne, by publication in a West Virginia newspaper at a time when she was in California, became effective on July 26, 1991. (Tr. 1589; Plaintiff's Exhibit No. 49). In fact, Anne did not have actual knowledge of this order until November 10, 1991. (Tr. 1299, 1310, 1600-04). Second, the order was of no force or effect because the order neither required a bond nor included a statement that no bond was necessary. W.Va.Code, 53-5-9. Third, Leavitt did not learn of this ineffective *ex parte* temporary injunction order until August 6 1991, **after** the act allegedly enjoined already had occurred. (Tr. 1013). Once the act allegedly enjoined had occurred prior to the constructive service of the order, it was impossible for Petitioners to violate the order, even if it had some legal effect.

Finally, Leavitt did seek to have the California Supreme Court review the decision by the California Court of Appeals. In that petition, Leavitt also sought the decertification of the opinion, due to some of the comments made by that court, which were untrue and unsupported by the record. While the California Supreme Court denied Leavitt's petition for certiorari, it did agree to decertify the opinion by the California Court of Appeal. *Kessel v. Leavitt*, 1998 Cal. LEXIS 6715. As a result of this decertification, the California Court of Appeal's decision cannot be cited as precedent and does not provide authority for any legal proposition.

The main thesis of the Respondent's brief is that every action taken by the Petitioners was part of a conspiracy to deny him what he considers to be his rights as the biological father. (Opp. 5). Of course, nothing could be further from the truth. Anne's sole objective was to do what she believed was in the best interests of Baby Boy Conaty. Leavitt simply gave Anne accurate legal advice regarding how the adoption could be accomplished without Respondent's signature, in accordance with existing California law. The remaining Petitioners provided Anne with the emotional support she needed during this time of personal crisis.

Anne honestly did not know what she was going to do when she fled West Virginia to get away from the Respondent, who had begun acting irrationally and whom Anne began to fear. There is no evidence to support the Respondent's bald assertion that somehow the Petitioners knew what Anne was going to do in January, 1991, when she left West Virginia.

The Respondent quotes from a letter Leavitt faxed to Brian Conaty, in which Leavitt asserted that "it is important that they be prevented from learning any more than they know already for another month if at all possible." (Opp. 5). Once Anne had placed Baby Boy Conaty with the adoptive couple, there is nothing wrong with the Petitioners desiring that the adoption be finalized without any interference by the Respondent. This nation has seen too many cases where a child, fully bonded with an adoptive couple, has been ripped away from a loving and secure home by a biological parent, who may not have the best interests of the child at heart. Besides, this letter, which Leavitt had intended to fax to Brian, was sent to the wrong fax number and was sent at a time when Brian was out of the country. (Tr. 1204-06).

For some reason, the Respondent includes in his appendix a copy of a fraudulent transfer complaint he has filed against Leavitt and some members of his family. (Opp. App. 17-26).

Apparently, the Respondent expects this Court to accept these mere allegations as true, even though Leavitt and his family have not even filed an answer to the complaint and the hotly disputed factual and legal issues that will be litigated in that case have not been resolved yet.

With respect to the appeal bond, the Respondent seeks to have this Court believe that Leavitt never argued that he could not afford the appeal bond imposed by the West Virginia Supreme Court. (Opp. 10-14). Leavitt did indeed argue that there was no statute or rule or case law providing the West Virginia Supreme Court with the legal authority to post such an unprecedented bond. However, in addition to these compelling and irrefutable legal arguments, Leavitt did provide the West Virginia Supreme Court with the disclosure of his assets, which had been filed in California, and explicitly argued that his Due Process and Equal Protection rights were violated by the requirement to post an appeal bond he lacked the assets to post, particularly since the Respondent had liens on all of Leavitt's property.

Additional inaccuracies are included in the Respondent's brief of varying degrees of importance. Leavitt never advised anyone on how to get around the law because all of the legal advice he gave was consistent with California law. (Opp. 6). The Respondent asserts that Leavitt lied during his deposition regarding his knowledge of the Canadian adoption proceedings. (Opp. 9). Leavitt testified in his deposition that he did not know when the adoption proceedings had been filed in Canada, which was true. In fact, the Canadian adoption proceedings were not commenced until four months after Leavitt's deposition. Brian did not advise his parents to ignore the deposition subpoenas served on them, but rather they thought a complaint had been served on them. (Opp. 7). Based upon that misunderstanding, Brian advised his parents to go on their scheduled vacation because they would have twenty days to

respond to a complaint. (Tr. 1236, 1294). The Respondent claims that he learned of the identity and location of the adoptive couple after receiving Anne's medical records. (Opp. 8). While this same factual error was made by the West Virginia Supreme Court, the record clearly and unequivocally demonstrates that the Respondent knew where the adoptive couple lived by January 15, 1992, about a month **before** the Respondent ever received Anne's medical records. (Tr. 761, 1649, Defendant's Exhibit 2). The record further reveals that no information regarding the adoptive couple was included in Anne's medical records.

RESPONSE TO LEGAL ARGUMENTS

With respect to the first question presented, the Respondent seeks to convince this Court that this case was decided on state tort law grounds, rather than the misapplication of decisions by this Court. (Opp. 15-21). However, the West Virginia Supreme Court's opinion clearly bases the Respondent's claim against Petitioners upon a misinterpretation and misapplication of this Court's *Lehr* decision. As the Petitioners quoted in their **PETITION**, the discussion of the Respondent's fraud claim begins, "Prior to reaching the precise issue of whether John adequately stated a valid cause of action for fraud, we must examine the rudimentary foundation upon which John rests his claim." App. at 34a. Even the Respondent acknowledges that the West Virginia Supreme Court then embarks on an extensive analysis of this Court's decisions ruling on the Due Process and Equal Protection rights of biological fathers. (Opp. 15-16). Clearly, if the West Virginia Supreme Court had not misinterpreted and misapplied *Lehr*, the Respondent would not have stated any case against the Petitioners.

Interestingly, the Respondent does not dispute the Petitioners' assertion that the West Virginia Supreme Court did misinterpret and misapply this Court's *Lehr* decision. This lack of any argument is necessitated by the fact that no person

reading *Lehr* would conclude that the potential Due Process and Equal Protection rights of a biological father can be used to overcome the decision by the mother to place her newborn child for adoption, where the biological father had asked her to abort the child and did not provide any financial support. While the Respondent argues that he could not provide for Anne financially while she was out of West Virginia during her pregnancy, the reality is that he never offered any support and could have given money to Anne's family if he had been serious about being a parent.

With respect to the appeal bond issue, the Respondent attempts to create the impression that the unprecedented appeal bond required of Leavitt is supported by case law. Never has this Court held that it is permissible for a court to require the posting of an appeal bond, for which there is no legal authority, in an amount that the appellant cannot afford financially, as a condition for being permitted to continue with an appeal. Respondent's reliance on *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954), is misplaced. (Opp. 22-23). In *National Union*, the state trial court had ordered a litigant to transfer certain assets to a receiver in the forum state. The court had jurisdiction over those assets because the litigant was a multi-state association, and the litigant's refusal to comply with the court's lawful order, which resulted in a contempt finding, was held to be sufficient reason to dismiss the appeal. Nothing stated in the *National Union* decision, which clearly is factually inapposite, provides any support for the appeal bond ruling in this case.

The Respondent also confuses the cost bond, which was posted by all Petitioners, with the appeal bond required only of Leavitt. (Opp. 24). The Respondent relies upon *Patterson v. Warner*, 371 F.Supp. 1362 (S.D.W.Va. 1972), where a cost bond was upheld by the District Court. However, the Respondent fails to acknowledge that this Court noted probable

jurisdiction in *Patterson* because the appeal bond issue in that case "appeared to present a significant issue, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Patterson v. Warner*, 415 U.S. 303, 303 (1974)(per curiam). The Court did not reach the merits of the constitutional issue, however, because an intervening state court decision deprived it of any continuing importance. There is no similar bar to review in this case.

Again, the Respondent does not dispute the fact that neither the statutes nor the rules nor the applicable case law authorized the West Virginia Supreme Court to require such an appeal bond. Thus, the question presented to this Court is whether a state court can require such an appeal bond, without any legal authority, in an amount that the appellant cannot afford to pay. If this appeal bond ruling is allowed to stand, then state courts will be able to deny appeals to appellants by requiring an appeal bond in an amount that such appellants cannot afford.

Furthermore, such a ruling would require every appellant to post a bond to stay execution of a judgment on appeal when the well recognized general rule is that the failure to post a bond to stay execution of judgment pending appeal is not a ground for dismissing the appeal. *Hudgins v. Kemp*, 59 U.S. 530 (1856); *see also* 5 Am.Jur.2d Appellate Review §442 (1995); C. Wright & A. Miller, Federal Practice & Procedure §2905 (1995). The imposition of this appeal bond requirement against Leavitt, without any legal authority and in an amount he could not afford, clearly violated his Due Process and Equal Protection rights.

Finally, with respect to the punitive damages issues, the Respondent confuses the Petitioners' argument. Petitioners have contended that all of the actions they took in West Virginia and in California were in full compliance with existing law. In California, the placement of Baby Boy Conaty

complied with existing case, which gave Anne the right to place her child for adoption, without any notice to or consent from the biological father. *See* Pet.4 n.2. The Respondent does not and, quite frankly, cannot dispute this fundamental fact. Thus, as was the case in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), this Court is faced with an award of punitive damages based upon actions that were legal in the state where the actions occurred.

The Respondent attempts to avoid this issue and the *ex post facto* argument by asserting that California and West Virginia have always recognized generally a cause of action for fraud. The problem with this argument is that the West Virginia Supreme Court openly acknowledges in its decision that no jurisdiction in this country has ever recognized a fraud cause of action under these facts. Thus, the constitutional issue presented not only is the violation of the Petitioners Due Process rights for being punished, based upon legal conduct, but the imposition of punitive damages for actions that never before had been recognized as forming the basis for such a claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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